
CANADA / JUDGMENT

E.B. v. Basi

2012 BCSC 1550

COURT

Supreme Court of British Columbia

DECIDED

22 October 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 1550 E.B. v. Basi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.B. v. Basi,

2012 BCSC 1550

Date: 20121022

Docket: 08-5321

Registry: Victoria

Between:

E.B. by her Litigation Guardian, Kimberley Ross Brown

Plaintiff

And:

Avtar Rashi Basi, Micheline Slader, The Provincial Director of

Child Welfare and Her Majesty the Queen in Right of the Province of

British Columbia (Ministry of Children and Family Development)

Defendants

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(On Costs)

Counsel for Acheson

Whitley Sweeney Foley:

G. Turriff, Q.C.

Counsel for the Public Guardian and Trustee:

D.B. Kirkham, Q.C.

Place and Date of Submissions:

Victoria, B.C.

August 29, 2012;

and September 10, 13 and 19, 2012

Place and Date of Judgment:

Victoria, B.C.

October 22, 2012

- [1] Primarily at issue is the entitlement of the Public Guardian and Trustee ("PGT") to full indemnity for its costs relating to previous court approval of the \$13,000,000 settlement of the infant plaintiff's tort claims and, more recently, court approval of the fees to which the law firm ("Firm"), that acted for the infant throughout, is entitled. According to the PGT, I should approve the costs in a lump sum of \$79,012.36 and order that they be paid out of the infant estate and by the Firm in such portions as are appropriate.
- [2] In reasons released August 3, 2012, available at 2012 BCSC 1169, I declined to accept the Firm's contention that I should approve fees of \$3,045,204.71, calculated in accordance with the contingency fee agreement signed by the guardians for the infant. The PGT opposed the application to approve fees calculated pursuant to the contingency fee agreement and submitted that I should approve fees of \$2,000,000 in all the circumstances.
- [3] Ultimately, I approved legal fees of \$2,400,000, plus applicable taxes, along with repayment of disbursements, treatment-related expenses, and special damages paid by the Firm. The latter expenses were not in issue as the PGT had agreed to them. In the result, the fees, as approved, were roughly \$600,000 less than the Firm sought but \$400,000 more than the PGT submitted was fair and reasonable.
- [4] The PGT raises subsidiary issues as follows:
1. Should the court summarily assess the costs pursuant to Supreme Court Civil Rule 14-1(15);
 2. If so, in what amount; and
 3. Should the Firm be required, under Rule 14-1(33), or under the parens patriae jurisdiction of the court, to personally bear any portion of the costs and, if so, in what amount.

- [5] The Firm says that it was the "successful party" on the fee approval application and, as such, is entitled to costs but waives them in the circumstances. The PGT, according to the Firm, was unsuccessful and there is no justification for any "apportionment" of costs between the Firm and the infant's estate. Further, the Firm says that Rule 14-1(33) governs awarding costs, in limited circumstances, directly against a party's lawyer, but is inapplicable here as the Firm was party to the proceeding. The Firm also contends that the PGT is disentitled to travel costs associated with the fee approval process and finally, submits that the court should fix the fees payable to the PGT as a lump-sum not exceeding \$29,000.
- [6] Rule 14-1(15) permits the court to award lump sum costs in a variety of circumstances, including the costs relating to a "particular application, step or matter in or related to the proceeding." Because I bifurcated the issues of settlement approval and fee approval, it is possible to separate the costs relating to the latter from the former for the purpose of addressing the various issues raised.
- [7] Before addressing those issues, however, I wish to make some observations. The Rules relating to costs are primarily directed towards determining which party or parties are entitled or disentitled to costs payable by the opposing, and typically unsuccessful, party or parties. There is a danger in shoehorning the analysis respecting entitlement or disentitlement into specific rules in the circumstances, as these proceedings are unique.
- [8] In particular, the role of the PGT is not that of an adversarial party. The PGT was required by s. 40 of the Infants Act, R.S.B.C. 1996, c. 223, to provide written comments to the court respecting the proposed infant settlement. As I stated in my previous reasons, approval of the legal fees to be paid to counsel for the infant is a necessary part of the settlement process and, accordingly, the PGT necessarily must comment on the proposed fees as well. Section 10 permits the court to direct that the costs of a proceeding "in which it is necessary or expedient" for the PGT to attend "be taxed and paid either out of the estate of the infant or by any other person who is a party to the proceeding."
- [9] Apart from s. 10, the PGT is entitled to be indemnified from the estate of the infant for its own counsel fees because its role is not as an adversary, but as an *amicus curiae*, to assist the court in determining the best interests of the infant. See *Chong (Guardian ad litem of) v. Royal Columbian Hospital* (1997), 36 B.C.L.R. (3d) 112 at para. 9; *British Columbia (Public Guardian and Trustee) v. Ralston*, 2008 BCCA 372 at paras. 38 to 41; *Murphy, Battista v. Tejani (Guardian ad litem of)*, 2009 BCSC 1782 at paras. 96 to 100; *Williams (Guardian ad litem of) v. Burnaby (City)*, 2001 BCSC 764 at paras. 77 to 83; and *Adams (Guardian ad litem of) v. Emmott*, 2000 BCSC 1812.
- [10] Of note, in *Chong*, the PGT was entitled to full indemnity even though the court approved the fees in the greater amount that counsel for the infant sought, and in *Ralston*, the Court of Appeal only partially reduced the fees sought by counsel for the infant, but nonetheless directed that the PGT be indemnified for its counsel's fees by way of a lump sum. Respecting indemnification of the PGT, in *Ralston*, the court pointed out, at para. 38:

The degree of success is not a factor that should be considered on such a matter. Rather, the question is whether the Public Guardian and Trustee was properly fulfilling his statutory duties. In this the question of whether the position of the Public Guardian and Trustee is unreasonable will be a consideration.

- [11] The role of the Firm in these proceedings is also unique. Before the settlement and fee approval process, the Firm acted as counsel for the infant. However, for the purposes of settlement and fee approval, its role notionally shifted. It is now, in effect, a party to the proceeding (*MacLeod v. Harrington (Public Trustee of)*, [1995] B.C.J. No. 2717 at paras. 214 and 228 (*Harrington*). As was the case in *Harrington*, the Firm is now an applicant and is represented by its own counsel.
- [12] I take from the dissent of Southin J.A. in *Harrington*, at paras. 104-110, that the parties to the proceedings relating to fee approval are the infant, represented by the PGT, and the law firm. In accepting that the infant's lawyer was a party to the proceeding, the majority appeared to accept Southin J.A.'s position in this regard.
- [13] For these reasons, the Firm's contention that it is waiving costs against the PGT to which it is, in law, entitled as a "successful party," is not analytically sound. When a law firm accepts a retainer respecting an infant claim, unless the PGT acts unreasonably, as stated in *Ralston*, and I would add, outside the boundaries of his statutory duties as a result, the PGT will be entitled to his costs. In most cases these costs are recouped from the infant's estate. There is no entitlement to costs against the PGT arising out of success even if the Firm had recovered the full amount of the fees claimed.
- [14] The infant and the law firm, on the other hand, will normally each pay their own costs. Here, the infant pays her legal fees by indemnifying the PGT through a costs award under s. 10, while the Firm absorbs its own costs. I intend to address this issue further when I consider the PGT's contention that the Firm should be partially responsible for indemnification.
- [15] I turn next to the PGT's claim for indemnification against the estate. The legal expenses that the PGT incurred totaled \$71,866.29, including disbursements and taxes. Copies of the invoices have been provided.
- [16] There are three invoices dated April 24, 2012, June 5, 2012 and July 13, 2012. The portion of the accounts relating to fee approval totals about \$60,000. In its reply submission, the PGT seeks an additional \$7,146.07 for the time spent on costs submissions. Accordingly, the total sought is \$79,012.36.
- [17] The expenses associated with travel to Victoria are approximately \$1,175. I find no merit in the Firm's contention that it was unreasonable for the PGT to hire Vancouver counsel and incur travel expenses without first demonstrating that no local counsel was available to do the work and need not address it further.

- [18] As to the fee portion of the accounts, the Firm says that the account should be adjusted because the PGT unreasonably made the Firm's estimates of time spent by its lawyers "the focal point of its investigation into the firm's charges and of its comments for the court's assistance." The Firm also suggests that some of the work could reasonably have been done by the PGT in-house.
- [19] These submissions overlook some important features of the case that, in my view, made it reasonable for the PGT to retain outside counsel and for counsel to question the time estimates. As the features were canvassed in detail in my earlier reasons, I will only list them here:
1. The infant settlement and the fees claimed by the Firm are the largest in B.C. history;
 2. The time spent by the Firm is a factor for consideration in the court approval of fees and is necessarily the subject of comment by the PGT;
 3. The Firm did not keep time records for the partners principally involved in the conduct of the file;
 4. The Firm estimated the time that the partners spent and provided that information to the PGT at the time it first invited the PGT to analyze and comment on the proposed settlement;
 5. The PGT questioned the validity of the time estimates;
 6. The Firm proceeded with the application for approval of the settlement and the court bifurcated the approval of the settlement and the approval of the fees over the objection of the Firm;
 7. At a management conference, the court ordered the partners of the Firm to provide affidavits respecting their time spent and eventually, cross-examination in advance of the hearing on the affidavit of the lead partner, all over the objections of the Firm;
 8. The above resulted in different time estimates than first provided to the PGT;
 9. In spite of an opportunity to withdraw its reliance on the accuracy of the estimates, the Firm declined to do so;
 10. The Firm continued to rely on the time estimates as conservative at the fee approval hearing; and finally
 11. The court did not accept the time estimates as reliable.

Having regard to the whole of the circumstances, I do not accept that it was unreasonable for the PGT to retain and instruct counsel to address the time issue. Given the magnitude of the fees at issue, and assuming that the Firm's time estimates were reliable, the fees sought by the Firm might have been reasonable. In the result, the PGT successfully challenged the reliability of the time estimates and obtained a significant reduction in the fees claimed by the Firm.

- [20] While the legal expenses incurred by the PGT are clearly high, I am unable to conclude that they are unreasonable in the circumstances. Accordingly, I decline to reduce them and assess them, as a lump sum, at \$79,012.36.
- [21] I now turn to whether the Firm can be held partially responsible for this sum. As was noted earlier, indemnification of the PGT is governed by s. 10 of the Infants Act, which allows the court to direct that the PGT's costs be paid out of either the estate of the infant or by "any other person who is a party to the proceeding."
- [22] On its face, s. 10 does not appear to contemplate that the infant's lawyer could be responsible for the PGT's costs. However, returning to the analysis in *Harrington*, the Firm is properly characterized as a party in this proceeding. In *Harrington*, the Court of Appeal awarded special costs against the lawyer on the basis of that determination. The logical conclusion is that I have jurisdiction to make an award of ordinary costs against the Firm, although I am not aware of the court ever making such an award.
- [23] This case differs from *Harrington* in that there are no grounds here for an award of special costs. The Firm did not engage in reprehensible conduct deserving of rebuke (*Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740). In my view, the Firm took a position on time spent that was unreasonable, but I would not characterize it as reprehensible based on the continuum of behaviour discussed in *Garcia* and other cases. As such, the only remaining possibility is that the Firm be liable for an award of ordinary costs.
- [24] I have already discussed the potential dangers of shoehorning the traditional analysis for an award of costs to the present proceeding. I am not convinced that there is any "successful" party with regard to fee approval.
- [25] The process mandated by the Infants Act is intended to ensure that the amount of the fee is in the infant's best interests. The PGT, on behalf of the infant, does not take an adversarial role against the infant's lawyer. The Firm has an obvious self-interest in the outcome but is not opposing the best interests of the infant.
- [26] Absent any basis to award special costs, I decline to award costs against the Firm.
- [27] Neither is there any basis for apportionment of costs. I agree with the Firm that Rule 14-1(33) does not apply. This rule allows the court to order a lawyer to indemnify his client in certain circumstances, such as where a "party's lawyer has caused costs to be incurred without reasonable cause." The Firm is not the "lawyer" but is, instead, a party to the fee approval proceedings. As such the rule does not apply here .

- [28] The PGT also relies on the *parens patriae* jurisdiction of the court as sufficient authority to order the Firm to pay a portion of the PGT's costs, even in the absence of reprehensible conduct. In other words, the PGT contends that the Firm should be directly responsible for the portion of the PGT's costs that are attributable to the Firm's unreasonable position respecting the amount of time spent. According to Mr. Kirkham, lead counsel for the PGT, about 60 percent of the costs should be allocated to the Firm as a result.
- [29] Before exercising *parens patriae* jurisdiction, I must be satisfied that there is a gap in the applicable legislation (*Temoin v. Martin*, 2012 BCCA 250 at para. 44). The Infants Act already invokes the *parens patriae* jurisdiction of the court to make decisions in the best interests of an infant plaintiff. Section 10 expressly permits the court to direct payment of the PGT's costs out of the estate or by the Firm. As I determined above, payment by the Firm would only be appropriate if there are grounds for special costs, as there are no "successful parties" in such a proceeding.
- [30] I am not persuaded that there is a gap that necessitates the independent exercise of *parens patriae* jurisdiction. Nor do I consider it necessary that I protect the interests of the infant by making an order for costs against the Firm.
- [31] I find it appropriate that, in a proceeding where both the infant and the Firm must participate, and where neither can be described as "successful", absent reprehensible conduct, each party should pay its own costs. The best interests of the infant plaintiff are adequately addressed under the existing legislation as the courts have interpreted it.
- [32] There is a slippery slope in penalizing the Firm at the behest of the PGT for taking positions considered to be unreasonable in the fee approval process. For the same reason, I am also not inclined to engage in considering whether counsel for the PGT approached the time spent issue, including cross-examination on the affidavit of the lead partner of the Firm, in an unreasonable way such that the costs of the PGT should be reduced as the Firm suggests.
- [33] Such an approach unfortunately encourages an additional expenditure of time and money and detracts from the proper focus, which should be the determination of a reasonable fee in as summary a way as possible. An overly litigious approach is not in the best interests of the infant plaintiff because the estate inevitably must fund some or all of the process.
- [34] As earlier stated, the role of the PGT is to assist the court in protecting the best interests of the vulnerable infant plaintiff. Rule 14-1(33) does not apply. The rules generally do not permit an order for special costs against a party absent reprehensible conduct. There was no reprehensible conduct here.
- [35] I decline to order that the Firm contribute to the costs of the PGT. I also decline to reduce the costs of \$79,013.36 to which the PGT is entitled. The PGT is entitled to be indemnified for those costs by the estate of the infant plaintiff.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/15/2012BCSC1550.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/e-b-v-basi-2012-bcsc-1550>

Prepared on 26 October 2026 · Esheria